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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2005

JAMES TOLBIRD AND LISA TOLBIRD
Petitioners

v.

ALLISON BELLE WYBLE, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND GREAT AMERICAN INSURANCE COMPANY
Respondents

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Louisiana

PETITION FOR WRIT OF CERTIORARI

Allan L. Placke
Counsel of Record
Johnson & Placke, L.L.P.
105 Regency Place
West Monroe, Louisiana 71291
318-322-7000

QUESTION PRESENTED

Does the failure or refusal to award any compensatory damages to an injured plaintiff for a painful and permanent physical injury resulting in thousands of dollars in past and future medical expenses, past and future lost wages, disability, chronic pain, and a suicide attempt violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioners James Tolbird and Lisa Tolbird are individuals. Respondent Allison Belle Wyble is an individual. Respondent Trinity Universal Insurance Company is an insurance corporation. Respondent United States Fire Insurance Company is an insurance corporation. Respondent Great American Insurance Company is an insurance corporation.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings and
Designation of Corporate Relationship ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provision Involved 1

Statement Of The Case 1

Argument 4

Conclusion 8

Appendix A Interrogatories to the Jury, filed July 31, 2003, Fourth Judicial District Court, Parish of Ouachita, State of Louisiana A-1

Appendix B August 27, 2003 Judgment of the Fourth Judicial District Court, Parish of Ouachita, State of Louisiana A-3

Appendix C Transcript of Hearing and Ruling on October 2, 2003 by the Honorable J. N. Dimos, on Plaintiffs' JNOV A-9

Appendix D December 15, 2004 Judgment of the Second Circuit Court of Appeal, State of Louisiana A-13

Appendix E April 29, 2005 Denial of Writs by the Supreme Court of the State of Louisiana A-27

TABLE OF AUTHORITIES

Jurisprudence:

BMW of North America, Inc. v. Gore, 517 U. S. 559, 116 S. Ct. 1589 (1996).....4

Coco v. Winston Industries, Inc., 341 So. 2d 343 (La. 1977).....5

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U. S. 424, 121 S. Ct. 1678 (2001).....6

Green v. K-Mart Corporation, 03-2495 (La. 5/25/04), 874 So. 2d 838 3,5

Grunenthal v. Long Island Railroad Company, 393 U. S. 156, 89 S. Ct. 331 (1968).....6

Henry v. Williams, 39,318 (La. App. 2d Cir. 1/26/05), 892 So. 2d 865, writ denied 05-0472 (La. 4/22/05), 899 So. 2d 576. 5

Kentucky Department of Corrections v. Thompson, 490 U. S. 454, 463, 109 S. Ct. 1904 (1999).....5

Logan v. Zimmerman Brush Company, 455 U. S. 428, 102 S. Ct. 1148 (1982).....5

State Farm Mutual Automobile Insurance Company v. Campbell, 538 U. S. 408, 123 S. Ct. 1513 (2003)....6

Tolbird v. Wyble, 38,969 (La. App. 2d Cir. 12/15/04), 892 So. 2d 103.....1

Tolbird v. Wyble, 05-0444 and 05-0449 (La. 4/29/05), 901 So. 2d 1066, 1067 1,4

TXO Production Corporation v. Alliance Resources Corporation, 509 U. S. 443, 113 S. Ct. 1589 (1993)...4

Youn v. Maritime Overseas Corporation, 623 So. 2d 1227 (La. 1993), writ denied 510 U. S. 1114, 114 S. Ct. 1257 (La. 1993).....5

Statutes:

Article 2294 of the Louisiana Civil Code.....4

Article 2315 of the Louisiana Civil Code.....4

Article 2315.4 of the Louisiana Civil Code.....4

28 USC §1257(a).....1

Miscellaneous:

U. S. Const. amend. XIV, §1.....1

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeal, State of Louisiana, is available at Tolbird v. Wyble, 38,969 (La. App. 2d Cir. 12/15/04), 892 So. 2d 103. The Louisiana Supreme Court denied the writ applications as reported in Tolbird v. Wyble, 05-0444 and 05-0449 (La. 4/29/05), 901 So. 2d 1066, 1067.

STATEMENT OF JURISDICTION

The writ denials of the Louisiana Supreme Court were entered on April 29, 2005. The jurisdiction of this Court is invoked pursuant to 28 USC §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U. S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

James Tolbird was seriously injured in an automobile accident in Monroe, Louisiana on May 5, 2001 when he was rear ended by Allison Wyble. He suffered a brachial plexus nerve injury that resulted in chronic pain such that he attempted suicide on one occasion. The case was tried before a jury that found the defendant Wyble 90% at fault for the accident and Mr. Tolbird 10% at fault. The jury awarded the sum of $73,250.66 in past medical expenses, future medical expenses of $10,000.00, future lost wages of $5,000.00 and zero for general damages or the physical and emotional injuries, loss of enjoyment of life and disability.[1]

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[1]Special damages in Louisiana are those damages awarded for medical expenses, lost wages and earning capacity, damage to property, and other

Ms. Wyble was insured by Trinity Universal Insurance Company with liability limits of $50,000 per person. At the time of the accident, James Tolbird was employed by American Meter Service and was insured under the uninsured/underinsured motorist provisions of a liability policy issued by United States Fire Insurance Company. The workmen's compensation carrier, Great American Insurance Company, intervened in the proceedings to recover the sums that it paid under its workmen's compensation policy.

The trial judge granted the plaintiff's Motion for Judgment Notwithstanding the Verdict and found that a zero general or compensatory damage award was clearly legal error and grossly inadequate where there were objective findings of injury, the plaintiff suffered from chronic pain such that he attempted suicide and there was extensive medical treatment and medical expenses. In increasing the award of general or compensatory damages from zero to $120,000.00, the trial judge pointed out that this was the first JNOV that he had ever granted because all of the other jury awards in previous cases had been adequately and fairly rendered.

The defendants appealed to the Louisiana Second Circuit Court of Appeal who reinstated the zero general or compensatory damage award finding that there was nothing in the record to support the trial judge's decision to overturn the jury verdict.[2] As further justification for reversing the trial judge, the appellate court speculated that the jury must have considered the sum of $30,000.00 tendered by the UM

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damages capable of being calculated to a mathematical certainty. General damages are those compensatory damages for physical pain and suffering, mental anguish and distress, loss of the quality of life and disability.

[2] The trial judge gave detailed reasons for his action based on the evidence at pages 1175-1177 of the record of trial which seems to have eluded the appellate court.

carrier prior to trial to be an award of general damages. There was of course no such evidence that this occurred in the record. The question posed and answered by the jury in this case was "What is the total amount of damages suffered by the plaintiff in this case . . . [for] physical pain, suffering, and mental anguish, past, present and future, including permanent disability, *without making any deduction for any reason?"* Thus, when asked to declare the amount of general or compensatory damages suffered (not the amount to be awarded) the jury answered "Zero." Additionally, the jury also determined that the plaintiff was entitled to "Zero" special damages for lost wages but the appellate court found that plaintiff had suffered in excess of $46,000 in lost wages and reversed the jury award. The special damages ultimately awarded by the appellate court exceeded $100,000.00. The tender of $30,000.00 was less than one-third of the special damages awarded in this case.

Subsequently, in Green v. K-Mart Corporation, 03-2495 (La. 5/25/04), 874 So. 2d 838, 843, the Louisiana Supreme Court clearly held that it was impermissible to fail to award any general or compensatory damages where the plaintiff suffered injuries from the accident, incurred medical expenses for treatment of those injuries and will require future medical treatment of those injuries. Specifically, the Court in Green, supra, set forth the constitutional standard in the following language:

> "Here the Court of Appeal correctly determined that the jury abused its discretion in failing to award general damages while awarding a substantial amount for past and future medical expenses. In this case, the jury determined that plaintiff suffered injuries casually related to the accident which required medical attention, and is still suffering an injury, that will, in fact, require medical attention in

the future. *Failure to make a general damage award in such circumstances was an abuse of discretion."* (Emphasis Added).

Inexplicably, plaintiff's writ application for review to the Louisiana Supreme Court was denied without explanation. See Tolbird v. Wyble, 05-0444 and 05-0449, (La. 4/29/05), 901 So. 2d 1066, 1067.

ARGUMENT

In our federal system, states have considerable flexibility in determining the level of compensatory and punitive damages that may be awarded in any particular case or classes of cases. BMW of North America, Inc. v. Gore, 517 U. S. 559, 116 S. Ct. 1589 (1996); TXO Production Corporation v. Alliance Resources Corporation, 509 U. S. 443, 113 S. Ct. 1589 (1993). In tort cases, the more serious the physical injuries, common sense and fundamental fairness dictate the greater the award of compensatory damages for pain and suffering, mental anguish and distress, loss of the quality of life, and disability. Louisiana, like the other states, provides compensatory damages to those persons who have been physically injured by another's negligence.[3] Louisiana tort law is grounded upon Article 2315 of the Louisiana Civil Code which provides:

"Any act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

This principle of fundamental fairness was embodied in Louisiana law as Article 2294 of the Louisiana Civil Code

[3]Louisiana is one of the few states that does not allow punitive damages for corporate fraud or to punish outrageous conduct that is willful, intentional or grossly negligent and injures someone. Punitive damages are available in Louisiana to a motorist who has been injured by a drunk driver as provided for in Article 2315.4 of the Louisiana Civil Code.

of 1825. It has survived intact throughout the years and stands for the principle that persons injured through another's negligence are entitled to be fairly and adequately compensated for those injuries. Louisiana courts have implicitly acknowledged that awards for personal injuries that are either grossly excessive or grossly inadequate violate the due process clauses of the Louisiana and United States Constitutions and cannot stand. Coco v. Winston Industries, Inc., 341 So. 2d 343 (La. 1977); Youn v. Maritime Overseas Corporation, 623 So. 2d 1227 (La. 1993), writ denied 510 U. S. 1114, 114 S. Ct. 1257 (La. 1993); Henry v. Williams, 39,318 (La. App. 2d Cir. 1/26/05), 892 So. 2d 865, writ denied 05-0472 (La. 4/22/05), 899 So. 2d 576.

Louisiana has set up through Article 2315 of the Louisiana Civil Code and the jurisprudence, most recently the Green case, particularized standards requiring the courts of this state to award compensatory and general damages based on objective and defined criteria. Specifically, where the trier of fact determines that the plaintiff has suffered injuries causally related to the accident and received medical treatment for those injuries, then it is mandatory to award general or compensatory damages for those injuries. Green v. K-Mart Corporation, supra. Persons injured in Louisiana through the wrongful conduct of another have a constitutionally protected interest to be fairly and adequately compensated through compensatory or general damages for those injuries. The use of "explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a [constitutionally protected] interest." Kentucky Department of Corrections v. Thompson, 490 U. S. 454, 463, 109 S. Ct. 1904 (1999). See also Logan v. Zimmerman Brush Company, 455 U. S. 428, 102 S. Ct. 1148 (1982).

While this Honorable Court has never articulated a constitutional due process standard for review of general or compensatory damage awards in tort cases, the federal circuit courts in reviewing and setting aside jury awards as either excessive or inadequate have used the terms "grossly excessive," "abuse of discretion," "shocking to the judicial consciences," "inadequate," "outrageously excessive," and many others. Grunenthal v. Long Island Railroad Company, 393 U. S. 156, 89 S. Ct. 331 (1968). Recently, this Honorable Court in State Farm Mutual Automobile Insurance Company v. Campbell, 538 U. S. 408, 123 S. Ct. 1513 (2003) set forth the principal that an excessive punitive damage award violates the Due Process Clause of the Fourteenth Amendment and "violates the elementary notions of fairness enshrined in constitutional jurisprudence." Likewise, the failure to award any compensatory or general damages for physical pain and suffering, mental anguish and distress, loss of the quality of life and permanent disability proven by the evidence and found by the trier of fact violates the basic and elementary notions of fairness embodied in our legal system. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U. S. 424, 121 S. Ct. 1678 (2001). The refusal to award any general or compensatory damages "shocks the conscience" and violates the Due Process Clause of the Fourteenth Amendment.

It is respectfully submitted that the issue of the adequacy of damages awarded to individuals injured and maimed through the negligence of others is certainly as important, if not more so, than the issue of the excessiveness of punitive damage awards against corporate defendants who have engaged in fraud, lies, misrepresentations, and artifices and other dubious business practices. The constitutional protections afforded individuals injured through negligence or willful conduct need to be addressed by this Honorable

Court, particularly in this era of unparalleled corporate greed and the erosion of individual rights. At the very least, the standard enumerated by the Louisiana Supreme Court in Green, supra, that damages are mandatory where the person injured receives medical treatment and/or continues to receive medical treatment for those injuries should be adopted. The issue of the fair and just compensation for injuries affects many more individuals in our society than those few cases where punitive damages are awarded and found to be excessive.

If a grossly excessive award of either punitive or compensatory damages violates the Due Process Clause of the Fourteenth Amendment then the reverse is also true, i.e., that a grossly inadequate award of compensatory or general damages (or, as in this case, no award) violates the Due Process Clause as well. In cases where the trier of fact, be it judge or jury, determines that the plaintiff has suffered injuries casually related to the accident which required medical treatment, the failure to make any award of compensatory or general damages for those injuries is constitutionally infirm. The refusal to award James Tolbird any compensatory damages for his injuries where the jury, and the appellate court, determined that he incurred tens of thousands of dollars for treatment of those injuries, will require future medical treatment, was unable to work for an extended period of time, and the physical pain was such that he attempted suicide, is simply absurd. The bedrock principle of our civil justice system is that compensatory or general damages are to redress the loss that plaintiff has suffered due to the defendant's wrongful conduct. The refusal to award any compensatory damages or general damages for acknowledged and proven injuries violates every notion of fairness and justice inherent in our civil justice system.

CONCLUSION

The decision of the Louisiana Second Circuit Court of Appeal in acknowledging that James Tolbird suffered serious injuries in the automobile accident, incurred tens of thousands of dollars in medical treatment for those injuries, incurred thousand of dollars in lost wages due to his disability, suffered from chronic pain such that he attempted suicide, and will need continued medical treatment but reversing an award of general damages in the amount of $120,000 to zero shocks the conscience and is simply outrageous. It deprives the plaintiff of a vested property right, that of an adequate, fair and just compensation for his physical and emotional injuries, and constitutes a clear violation of the Due Process Clause of the Fourteenth Amendment. This Honorable Court should grant the writ of certiorari, reverse the award of zero general or compensatory damages, reinstate the award of $120,000 in general damages made by the trial judge and remand this case back to the Louisiana Second Circuit Court of Appeal for further proceedings.

Respectfully Submitted:

Allan L. Placke
Counsel of Record
Johnson & Placke, L.L.P.
105 Regency Place
West Monroe, Louisiana 71291
318-322-7000

Date: July 27, 2005

FOURTH JUDICIAL DISTRICT COURT
PARISH OF OUACHITA
STATE OF LOUISIANA

JAMES TOLBIRD FILED:_____
VS. NO. 01-4154
ALLISON BELLE WYBLE DY.CLERK:
AND TRINITY UNIVERSAL
INSURANCE COMPANY

INTERROGATORIES TO THE JURY

1. Was the defendant, Allison Wyble, guilty of sub-standard conduct which proximately caused plaintiffs' damages?

Yes X No__

2. If the answer to Question 1 is "yes," what is the degree of defendant Allison Wyble's fault expressed in a percentage?

Answer: 90

3. Was the plaintiff, James Tolbird, guilty of sub-standard conduct which proximately caused his own damage?

Yes X No__

4. If the answer to Question 3 is "yes," what is the degree of fault, expressed in a percentage?

Allison Wyble 90 %

Jamie Tolbird 10 %
(Must add up to 100%)

5. What is the total amount of damages suffered by plaintiffs in this case, without making any deductions for any reason:

JAMES TOLBIRD

A. Medical Expenses:
(1) incurred in the past ..... $ 73,250.66
(2) to be incurred in the future..... $10,000.00

B. Physical pain, suffering, and mental anguish, Past and future, including permanent disability: $ -0-

C. Lost Wages:
(1) experienced in the past..... $ -0-
(2) to be experienced in the future... $ -0-

LISA TOLBIRD

A. Loss of consortium, service and society.....$ 5,000.00

3. Do you find that the defendant, United States Fire Insurance Company, was in bad faith in its handling or payment of plaintiffs' claims?

Yes__ No_X_

If you answered "Yes" to question # 3, then proceed to question #4.

4. What amount do you find will reasonably and adequately compensate the plaintiffs for each of the following elements of damage in connection with bad faith claim?

A. Penalties..... $

B. Attorneys Fees..... $

7/31/03	Robby Williams
DATE	FOREPERSON

FOURTH JUDICIAL DISTRICT COURT
PARISH OF OUACHITA
STATE OF LOUISIANA

JAMES TOLBIRD FILED: August 27, 2003

VERSUS NO. 01-4154

ALLISON BELLE WYBLE DY.CLERK: Barbara Boyett
AND TRINITY UNIVERSAL
INSURANCE COMPANY

JUDGMENT

This matter having been regularly filed and served and put at issue by answer thereto and set down for trial and tried before a jury on July 28, 29, 30 and 31, 2003, the jury having heard the evidence, the arguments, and the stipulations of counsel and having returned its verdict finding ALLISON BELLE WYBLE ninety (90%) percent at fault for causing the accident subject of this suit and JAMES TOLBIRD ten (10%) percent at fault for causing the accident subject of this suit, the court considering the law and evidence to be in favor thereof:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, JAMES AND LISA TOLBIRD, and against the defendants, ALLISON BELLE WYBLE and TRINITY UNIVERSAL INSURANCE COMPANY, assessing the Defendant, ALLISON BELL WYBLE, with ninety (90%) percent of the fault for causing the accident subject of this suit, and that Plaintiff, JAMES TOLBIRD, be assessed with ten (10%) percent of the fault for causing the accident subject of this suit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, JAMES TOLBIRD, and against the defendant, ALLISON BELLE WYBLE, in the full sum of SEVENTY-

NINE THOUSAND FOUR HUNDRED TWENTY-FOUR AND 99/100 ($79,424.99) DOLLARS, representing the sum of $65,924.99 in past medical expenses, $9,000.00 in future medical expenses, $0.00 in past lost wages, $4,500.00 in future lost wages, and 0.00 in past and future general damages, after reducing the damages awarded by the jury ten (10%) percent, for the comparative fault of the plaintiff, JAMES TOLBIRD, with legal interest thereon from date of judicial demand until paid, and that there be judgment herein in favor of plaintiff, LISA TOLBIRD, and against the defendant, ALLISON BELLE WYBLE, in the full sum of FOUR THOUSAND FIVE HUNDRED AND NO/100 ($4,500.00) DOLLARS for loss of consortium, after reducing the damages awarded by ten (10%) percent for the comparative fault of the plaintiff, JAMES TOLBIRD, with legal interest thereon from date of judicial demand until paid, subject to a credit of $54,826.96 previously tendered by the defendant, TRINITY UNIVERSAL INSURANCE COMPANY, deposited into the registry of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, JAMES TOLBIRD AND LISA TOLBIRD, and against the defendant, TRINITY UNIVERSAL INSURANCE COMPANY, in the full sum of FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS, representing the liability limits of the automobile liability insurance policy issued to the defendant, ALLISON BELLE WYBLE, with legal interest thereon from date of judicial demand until paid, subject to a credit of $54,826.96 previously tendered by the defendant, TRINITY UNIVERSAL INSURANCE COMPANY, and deposited into the registry of the Court.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, JAMES TOLBIRD AND LISA TOLBIRD, and against the defendant, UNITED STATES FIRE INSURANCE COMPANY, in the full sum of THREE

THOUSAND NINE HUNDRED TWENTY FIVE AND 66/100 ($3,925.66) DOLLARS with legal interest thereon from date of judicial demand until paid.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the workman's compensation expenses paid by Intervenor, GREAT AMERICAN INSURANCE COMPANY, for medical expenses and weekly indemnity payments be recognized in the amount of SEVENTY-ONE THOUSAND THREE HUNDRED NINETY NINE AND 91/100 ($71,399.91) DOLLARS and that Intervenor recover the sum of $54,826.96 deposited in the registry of this court by the defendant, TRINITY UNIVERSAL INSURANCE COMPANY, less the sum of one-third (33 1/3%) due to Johnson and Placke, Attorneys, as attorneys fees ~~as well as the costs incurred in bringing this matter to trial and the costs incurred as a result of the trial itself pursuant to law.~~ JND

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the claim of the defendant, UNITED STATES FIRE INSURANCE COMPANY, against the defendant, ALLISON BELLE WYBLE, for contribution, reimbursement or indemnity is hereby dismissed with full prejudice at the cost of the defendant, UNITED STATES FIRE INSURANCE COMPANY.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court will determine and tax costs in this matter after a hearing that will be set at a later date as well as determine any future credit that may be due Intervenor, Great American Insurance Company, after the costs have been taxed.

JUDGMENT RENDERED IN OPEN COURT this 31st day of July, 2003 in Monroe, Ouachita Parish, Louisiana.

JUDGMENT SIGNED IN OPEN COURT this ____ day of August, 2003 in Monroe, Ouachita Parish, Louisiana.

HONORABLE J.N. DIMOS

JUDGE, FOURTH JUDICIAL DISTRICT COURT

APPROVED AS TO FORM:

BY:_____

DON H. JOHNSON #7287
JOHNSON & PLACKE, ATTORNEYS
105 Regency Place
West Monroe, Louisiana 71291
Phone # 318-322-7000

Attorney for Plaintiffs, James Tolbird and Lisa Tolbird

BY:_____

GEORGE M. SNELLINGS, IV #_____
NELSON, ZENTNER, SARTOR & SNELLINGS, LLC.
1507 Royal Avenue
Monroe, LA 71201
Phone # 318-388-4454

Attorney for Defendants, Allison Belle Wyble and Trinity Insurance Company

BY:_____

STEVEN E. SOILEAU #17150
MEYER, SMITH & ROBERTS, LLP
1550 Creswell Avenue
Shreveport, LA 71101
Phone # 318-222-2135

Attorney for Defendant, United States Fire Insurance Company

BY:_____

ROBERT DUNKELMAN #_____

Pettiette, Armand, Dunkelman, Woodley, Byrd &
Cromwell, L.L.P.
Post Office Box 1786
400 Texas Street, Suite 400
Shreveport, LA 71101
(318) 221-1800

Attorney for Intevenor, Great American Insurance
Group

JAMES TOLBIRD STATE OF LOUISIANA
VS.NO. 01-4154 PARISH OF OUACHITA
ALLISON WYBLE AND FOURTH DISTRICT COURT
TRINITY UNIVERSAL INC.

BE IT KNOWN AND REMEMBERED that upon Judge's Ruling in the above styled and numbered case in the Fourth District Court, Parish of Ouachita, State of Louisiana, on the 2nd day of October, A. D., 2003, before Honorable Jimmy N Dimos, Judge, at Monroe, Louisiana, the following proceedings were had, to wit:

APPEARANCES: Allan Placke, Attorney at Law
Attorney for Plaintiff

Steve Soileau, George Snellings, Tara Johnson, Attorneys at Law
Attorney for Defense

By The Court: All right. I've had, I guess a bunch of jury trials in Morehouse parish and Ouachita Parish and I've never had to reverse one or change one. They've been fairly and adequately rendered. Whether for the Plaintiff or for the Defendant. But, in this case there is a legal error. When you have past medical paid, future medical paid and then they come back with zero award for general damages. And that's the area that I'm concerned with. Based on the –there was some objective findings. There was chronic pain. This guy was going to a pain management clinic. The psychologist thought that they could get him off the pain medication within six months. Maybe that was Dr. Ware. White? That could get him back in the workforce in six months and change his medication.

By Mr. Placke: I believe they tried to get him off the medication and they could not do it. And that's when the suicide attempt resulted. In fact, Dr. Ellis, I think, implemented all of Dr. Ware's recommendations.

By The Court: But, it's a case that I made my recommendation a long time ago. And, un, I don't see the figures. Mr. Placke and Mr. Johnson did a great job of presenting the figures and the medical. But, you know the jury didn't buy it and frankly I have some reservation about his total incapacity for the future. For many years to come. But, I believe that the Thirty Thousand, it's inadequate for the general damages. And as a result I'm going to increase that for thirty months to One Hundred and Twenty Thousand Dollars ($120,000) with credit for the Thirty Thousand that he was paid. In addition to that the only other change I will make is for the pain and suffering, loss of consortium of the wife and take Mr. Snellings figure, the medium figure of Twenty Thousand Dollars ($20,000.00) instead of Five. Now, with those changes I will be glad to sign a judgment no withstanding the verdict. Based on that ruling. I'm not changing anything else other than the general damages to One Hundred Twenty Thousand with credit for the Thirty paid. And Twenty Thousand for the loss of consortium with credit of Five Thousand.

By Mr. Snellings: And deny the Motion for New Trial? Is that correct, your Honor?

By the Court: Oh yeah.

By Mr. Snellings: They were before this Court.

By the Court: Yeah. There won't be a new trial. Anything else? Mr. Soileau?

By Mr. Soileau: Show all of their claims rejected, right? You denied everything else.

By the Court: Everything else is as the jury came back.

By Mr. Soileau: If I might ask the Court, um, I know you retained your jurisdiction over the cost issue. And it sort of makes it whether it's assessed against me or them moot at this point. But, could your fix Dr. McHugh's fee? Because he's called me. And sent that bill. And if we could get it fixed by the Court.

By The Court: I'll be glad to fix it. How much time do you – what do ya'll recommend based on your expenses?

By Mr. Soileau: He testified fifteen minutes. Your Honor, we made arrangements first thing in the morning. He was here fifteen minutes. IF he walked from his office here and back it was 45 minutes to an hour, I imagine.

By the Court: Where is his office?

By Mr. Snellings: It's just right here. The P & S building.

By the Court: And he wanted Three Thousand?

By Mr. Soileau: Yes, Sir.

By The Court: So, what are ya'll recommend?

By Mr. Soileau: Well, his deposition is Five Hundred Dollars ($500.00) for the first hour. Actually, Judge, we've already paid him Fifteen Hundred Dollars ($1,500.00) to be nice. If you think that's plenty or that's too much. I can tell him that. I thought that was generous.

By The Court: Fifteen Hundred Dollars ($1,500.00) is his total fee. Put that in the judgment. Now, do you thin you can settle it, Mr. Soileau?

By Mr. Soileau: I can try, your Honor. I understand exactly what the Court's ruling was. I'm thinking out loud and that's dangerous about the general damage award. You're specifically crediting the Thirty Thousand already paid on the general damage award?

By The Court: Up to A Hundred Twenty.

By Mr. Soileau: Yes, Sir.

By The Court: You can still take your ten percent for contributory negligence.

State of Louisiana
Parish of Ouachita

I HEREBY CERTIFY that the above and foregoing pages numbered one (1) through five (5), all inclusive, contain a true and correct transcript of my Sony tape in the case of James Tolbird vs. 01-4154 Allison Wyble and Trinity Universal Insurance on the 2nd day of October, A.D. 2003, in the Fourth District Court, Parish of Ouachita, State of Louisiana, before Honorable Jim N. Dimos, at Monroe, Louisiana.

IN TESTIMONY WHEREOF I sign hereto this 3rd day of October, A.D. 2003.

Martha Strickland
Official Court Reporter for the
Fourth District Court, Parish of
Ouachita, State of Louisiana

Judgment rendered December 15, 2004. Application for rehearing may be filed within the delay allowed by Art. 2166, LSA-CCP.

No. 38, 969-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

JAMES TOLBIRD — Plaintiff-Appellee

Versus

ALLISON BELLE WYBLE AND TRINITY UNIVERSAL INSURANCE COMPANY — Defendants-Appellants

* * * * *

Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 014154

Honorable Jimmy N. Dimos, Judge

* * * * * *

NELSON, ZENTNER, SARTOR & SNELLINGS By: George Snellings, IV	Counsel for Defendant Appellant Trinity Universal Ins. Co. and Allison Belle Wyble
MAYER, SMITH & ROBERTS By: Steven E. Soileau	Counsel for Defendant Appellant United State Fire Ins. Co.
PETTIETTE, ARMAND, DUNKELMAN, WOODLEY BYRD & CROMWELL By: Robert Dunkelman	Counsel for Intervenor Appellee Great American Ins. Co.

JOHNSON & PLACKE
By: Don H. Johnson

Counsel for Plaintiff Appellees James Tolbird and Lisa Tolbird

* * * * * *

Before STEWART, DREW and LOLLEY, JJ.

STEWART, J.

Allison Wyble ("Wyble"), Trinity Universal Insurance Company ("Trinity"), and United States Fire Insurance Company ("U.S. Fire") appeal a Judgment Notwithstanding the Verdict ("JNOV") rendered by the trial court awarding damages to James and Lisa Tolbird. The Tolbirds also appeal citing the inadequacy of various damage awards and the allocation of fault. For the reasons that follow, we reverse the JNOV, reinstate the original jury verdict in part, amend in part, and remand.

FACTS

On May 2, 2001, James Tolbird was working as a meter reader for American Meter Services when he was rear ended in the company truck by Allison Wyble. Tolbird finished his day at work, but shortly thereafter, began to complain of neck pain. He saw Dr. Thomas Dansby on May 3, 2001, who diagnosed him with whiplash or soft tissue injury from the accident. Tolbird's pain continued, and he returned to Dr. Dansby on May 14, 2001, with complaints of muscle spasms, pain, and headaches. Dr. Dansby prescribed medication and physical therapy. Even though Tolbird's condition apparently worsened, Dr. Dansby sent him to work in a light duty capacity on May 18, 2001. On May 22, 2001, Tolbird began treatment with his personal doctor, Dr. Floyd Jones, who is an osteopathic physician. However, because there was no improvement in his condition, Tolbird was next seen by pain management specialist, Dr. Ronald Ellis. He diagnosed Tolbird with whiplash injury syndrome. Dr. Ellis treated Tolbird with narcotic medication and anti-

depressants, a series of cervical steroid epidural injections on three occasions, a bilateral occipitalerocal nerve block, a galvanic stimulator, left rhomboid trigger point injections, and a medial branch neurectomy with radio frequency. Dr. Ellis also restricted Tolbird's driving because of the narcotic medication.

In September 2002, the workers' compensation insurer sent Tolbird to Dr. William Whyte, a pain management specialist. Dr. Whyte found objective proof of injury that he deemed significant, namely, the loss of muscle mass in the same region that Tolbird complained of pain. However, he determined that Tolbird could work with certain restrictions.

Tolbird continued treatment with Dr. Ellis throughout 2003. It was Dr. Ellis' opinion that the injuries suffered by Tolbird were permanent. While he was under Dr. Ellis' care, Tolbird became depressed and attempted suicide by overdosing on medication.

A trial ensued concerning the amount of damage suffered by Tolbird as a result of the accident. Prior to the trial, Trinity Universal, which had liability coverage for Wyble, tendered its $50,000 policy limits plus interest into the registry of the court. United States Fire Insurance Company, Wyble's UM carrier, unconditionally tendered the sum of $30,000 prior to the trial. Great American Insurance Company, Tolbird's employer's workers' compensation carrier, intervened in the suit seeking credit for the amounts tendered to Tolbird. The parties stipulated that Great American paid a total of $71,399.91 in benefits to Tolbird. Following the trial, the jury found Wyble 90% at fault and Tolbird 10% at fault. The jury awarded the sum of $73,250.66 in past medical expenses, future medical expenses of $ 10,000, future lost wages of $5,000 and loss of consortium to Lisa Tolbird in the amount of $5,000 for a

total of $93,250.66. The jury apparently regarded the $30,000 tendered by U.S. Fire as representing an award for general damages and did not award any more. However, the trial court granted Tolbird's request for a JNOV increasing the award for loss of consortium from $5,000 to $20,000 and awarding the sum of $120,000 in general damages, limiting those damages to 30 months. This appeal ensued.

DISCUSSION

JNOV

A JNOV is a procedural device authorized by La. C.C.P. art. 1811 whereby the trial court may correct a legally erroneous verdict by modifying fault or damages, or both, that the jury may have assessed. *Matthews v. Arkla Lubricants, Inc.*, 32,121 (La. App. 2d Cir. 8/18/99), 740 So. 2d 787; *Greene v. Fox Crossing, Inc.*, 32,774 (La. App. 2d Cir. 3/1/00), 754 So. 2d 339, *writ denied*, 2000-0944 (La. 5/26/00), 762 So. 2d 1108. If the opposing evidence is of such quality and weight that reasonable men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. To determine that the evidence was insufficient as a matter of law requires a finding that no valid line of reasoning and permissible inferences could possibly lead rational persons to the conclusions reached by the jury. *Matthews, supra.* The JNOV should not be granted merely when there is a preponderance of evidence for the mover. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all inferences or factual questions should be resolved in favor of the non-moving party. *Anderson v. New Orleans Pub. Serv., Inc.*, 583 So. 2d 829 (La. 1991); *Craighead v. Preferred Risk Mut. Ins. Co.*, 33,73 1 (La. App. 2d Cir. 8/25/00), 769 So. 2d 112, *writ denied*, 2000- 2946 (La. [2/15/00), 777 So. 2d 1230. As noted by this court in *Gibson v. Bossier City General Hosp.*, 594 So. 2d 1332 (La. App. 2d Cir. 1991), the scales are clearly tilted in favor of the survival of the jury's verdict, but

the trial court is left with a breadth of discretion which varies with the facts and events of each case. What the appellate court reviews is the decision of the trial judge, who has attempted to balance the great deference afforded to the jury's verdict against his obligation to insure that substantial justice was accomplished. Thus, in reviewing the trial court's determination regarding whether to grant a JNOV or new trial, the appellate court's review is limited to whether the trial court committed manifest error in its decision on the motions. *Gibson, supra.*

Following the jury verdict, the trial judge granted a JNOV and increased the general damage award to James Tolbird from $30,000 to $120,000. He also increased Lisa Tolbird's award for loss of consortium from $5,000 to $20,000. However, we find that the granting of the JNOV was clearly error of law. There is nothing in the record that supports the trial judge's decision to overturn the jury's verdict. The trial judge did not give any reasons for the granting of the JNOV. But our review of the record leads us to the conclusion that the jury's original verdict, as to the issues addressed in the JNOV, was supported by the evidence presented.

Consequently, we reverse and vacate the JNOV and reinstate the jury's original verdict of the sum of $73.,250.66 in past medical expenses, ` 10,000 in future medical expenses, $5.000 in future lost wages, and $5,000 to Lisa Tolbird for loss of consortium. We find no error in the jury verdict as it relates to general damages, loss of consortium, or allocation of fault. However, we find that there are other problems with the original verdict that necessitate an amendment of those awards.

Amendment of Original Jury Award of Damages

The primary reason for the confusion surrounding the

award of damages was the trial court's decision to allow the jury to hear evidence of payments by workers' compensation which is prohibited by La. C.E. art. 414 which states,

> Evidence of the nature and extent of a worker's compensation claim or of payment of past or future worker's compensation benefits shall not be admissible to a jury, directly or indirectly, in any civil proceeding with respect to a claim for damages relative to the same injury for which worker's compensation benefits are claimed or paid. Such evidence shall be admissible and presented to the judge only.

Each party attempted to use the payment or nonpayment of workers' compensation benefits to buttress their respective claims and only served to confuse the jury as to the proper calculation of damage awards.

Past Medical Expenses

There are several issues raised by each party concerning the various damage awards by the jury. We will first discuss the award for past due medical expenses. At the outset, we note that the bills contained in the exhibit are unnecessarily duplicative and confusing. We also note that the award of $73,250.66 by the jury comes from a figure used by the plaintiffs on a summary presented during closing arguments. The defendants argue that the award must be reduced because there was no evidence that some of the bills existed. This contention centers around a medical summary entered as Plaintiff's Exhibit 1 purportedly listing all of plaintiff's medical expenses and denoting which of those expenses had been paid by workers' compensation. According to that exhibit, the plaintiff had a total of only $60,660.09 in medical expenses. The defendants assert that $14,747.99 of

the bills do not exist or are unsupported by the record. Specifically, they refer to the following:

	Amount of Bill	Amount Paid by WC
ACT Medical	$ 890.11	785.99
Bailey, Myron	280.00	-0-
EMS	388.70	388.70
EMS(suicide related)	342.00	-0-
Monroe Medical Clinic	483.28	483.28
Monroe MRI Center	1,073.00	815.40
Orthopedic Clinic (suicide related)	3,728.00	-0-
P & S Surgery Center	7,466.00	6,788.50
Radiology Associates	96.90	96.90

However, we note that the parties stipulated that the workers' compensation carrier paid $46,468.37 in medical expenses, and there is nothing in the record to dispute plaintiff's claim that the above bills were paid by the workers' compensation carrier. Of the three remaining bills not paid by workers' compensation, the bill from the Orthopedic Clinic in the amount of $3,728 is attached to Plaintiff's Exhibit 1 contrary to the defendants' claim. Thus, we find that of above listed bills, only $622.00 is unsupported by the record, and the medical expenses must be reduced by this amount.

In addition, the defendants contend that there is another $2,816.92 in wrongly listed bills on the exhibit. They assert that the amount listed is different than the amount documented for the following bills:

	Amount claimed	Amount documented
Walgreens Pharmacy	$1,851.71	278.99
Dr. Floyd Jones	440.00	265.00

Wal-Mart Pharmacy	246.14	461.97
Glenwood Regional	20,125.15	18,331.12
La.Pain Mgmt.(Dr. Ellis)	12,871.50	13,380.50

Of the listed bills, the plaintiffs assert that $1,786.71 of the Walgreens bill was paid by workers' compensation, so as mentioned above, we will accept that amount as part of the total stipulated amount of workers' compensation received by the plaintiff. Our review of the extensive medical records contained in the exhibit revealed that the total charges from Dr. Floyd Jones were actually $570.00, which is $130.00 greater than the amount alleged by either side. The defendants further state that the plaintiffs listed the amounts in the bills from Dr. Ellis and the Wal-Mart Pharmacy at numbers less than what was revealed in the exhibits. Specifically, the evidence reveals that there was actually $215.83 more in bills from Wal-Mart than was listed on the exhibit. Likewise, the record shows that there was $509.00 more in medical medical bills from Dr. Ellis than was listed in the exhibit. The total increase in medical expenses from these two accounts is $724.83. However, the defendants are correct concerning the deficiency in the bill for Glenwood Regional. The correct amount is $18,331.12 resulting in an overage of $1,794.03. The net result of these miscalculations is a decrease in the medical bills in the amount of $939.20. Consequently, the award of medical damages must be reduced by this amount.

We find that the jury award of $73,250.66 is unsupported by the record. Because of the stipulation as to the workers' compensation payments, we know that a minimum of $46,468.37 was incurred by the plaintiff. Obviously, the jury determined that the medical bills incurred as a result of the suicide attempt were related to the injury at issue. We do not find that conclusion manifestly erroneous. We find that the record supports evidence of medical expenses totaling, $59,098.89. Thus, we amend the

award of medical expenses accordingly.

Future Medical Expenses

Turning now to the award of future medical expenses, we find that the jury was not manifestly erroneous in awarding $10,000.00 in damages. During closing arguments, even counsel for Allison Wyble conceded that it would be acceptable to allow for up to a year and a half for psychiatric treatment for Tolbird's depression and related issues. Moreover, Dr. Torres testified that Tolbird needs about two years of therapy and medication at a cost of $6,500.00. We find no merit to this assignment and affirm this award by the jury.

Past/Future Lost Wages

The jury awarded no money in past lost wages, yet they awarded $5,000.00 in future lost wages. This finding was clearly in error. Each party stipulated that the plaintiff had received $24,931.54 *in* indemnity benefits for lost wages from workers' compensation. It is then axiomatic that there have been lost wages in the instant case. Dr. Charles Bettinger, a forensic economist, testified that Tolbird had past lost wages in the amount of $46,509.00. However, that figure did not take into account any adjustment for benefits received through workers compensation. Consequently, we will credit Dr. Bettinger's calculations by the amount received under workers' compensation and award the plaintiff $21,577.56 in past lost wages, On the other hand, none of the medical testimony elicited at trial indicated that Tolbird would never be able to return to work. Instead, the testimony supports the fact he would need vocational rehabilitation. 'There is no abuse of discretion in an award of $5,000.00 under these circumstances.

Insurance Coverage

A secondary issue in this case is whether the workers' compensation carrier, Great American, which is the intervenor in this matter, is entitled to a credit for future damages paid to Tolbird by the UM carrier, U.S Fire. In supplemental reasons for judgment, the trial court rejected Great American's claims for reimbursement citing *Travelers Ins. Co. v. Joseph,* 95-0200 (La. 6/30/93), 656 So. 2d 1000. The UM policy has an exclusion for payment of benefits under workers' compensation and we have held that a workers' compensation carrier cannot recoup benefits paid to a claimant under a UM policy if the policy specifically excludes reimbursement to the insurer. *Tommie 's Novelty v. Velasco,* 37,924 (La. App. 2d Cir. 2/26/04), 868 So.2d 962. In second supplemental reasons for judgment, the trial court also denied Great American's claims for credit for future payments made to Tolbird by U.S. Fire. Great American contends that the trial court erred in the calculation of its future credit and/or by denying them a future credit for what Tolbird is to receive from the UM carrier. Great American asserts that it is entitled to a credit under La. R.S. 23:1102(A)(2) which states:

> Any dispute between the employer and the employee regarding the calculation of the employer's credit may be filed with the Officer of Workers' Compensation and tried before a Workers' Compensation Judge. If a third party action has been filed in district court, such dispute shall be filed in the district court and tried before the district judge unless the parties agree otherwise.

The parties have stipulated to the amount of the employer's intervention, and we conclude that Great American is entitled to recover that amount, less any reduction for fees under *Moody v. Arabie* , 498 So. 2d 1081 (La. 1986) from

the tortfeasor and her liability carrier. *Moody* has been adopted by our legislature and is embodied in La. R.S. 23:1103 (C)(1), which states:

> C. (1) If either the employer or employee intervenes in the third party suit filed by the other, the intervenor shall only be responsible for a share of the reasonable legal fees and costs incurred by the attorney retained by the plaintiff, which portion shall not exceed one-third of the intervenor's recovery for prejudgment payments or prejudgment damages. The amount of the portion of attorney fees shall be determined by the district court based on the proportionate services of the attorneys which benefited or augmented the recovery from the third party. The employee as intervenor shall not be responsible for the employer's attorney fees attributable to postjudgment damages nor will the employer as intervenor be responsible for the attorney fees attributable to the credit given to the employer under Subsection A of this Section. Costs shall include taxable court costs as well as the fees of experts retained by the plaintiff. The pro rata share of the intervenor's costs shall be based on intervenor's recovery of prejudgment payments or prejudgment damages.

La. R.S. 23:1101 provides that the payment of compensation does not affect an injured employee's right to claim damages from a third person. Furthermore, the right of an employer to recover workers' compensation payments made to an employee injured in a work-related accident caused by a third person is firmly established in our law. *Degruise v. Houma Courier Newspaper Corp.*, 2000-0229 (La. App. 1 Cir. 3/28/02), 815 So. 2d 1074; *Landry v. Martin Mills, Inc.*, 98-1395 (La. App. 3d Cir. 3/3/99), 737 So. 2d 58, 60, *writ denied,* 99-0957 (La. 6/4/99), 744 So. 2d 625. La. R.S. 23:1101(B) specifically provides for a right in one who

has paid compensation benefits to an injured employee to bring suit against the third person, who has caused the injury, to recover any amount which he has paid or becomes obligated to pay as workers' compensation to such employee. Therefore, an employer can recover the amount it has paid in workers' compensation benefits to its injured employee from the third person who is actually responsible for the damages incurred. *Landry v. Martin Mills, Inc.*, 737 So. 2d at 60. Because the employer's UM insurer is obligated to repair damage caused by an uninsured or underinsured motorist, an employer's UM insurer is a "third person" legally liable to pay an employee damages resulting from a work-related automobile accident. *Johnson v. Fireman's Fund Ins. Co.*, 425 So. 2d 224, 227 (La. 1982). Thus, an employer's UM insurer is a "third person" from whom an employer or its workers' compensation insurer can recover reimbursement of benefits paid to the injured employee. *Travelers Ins. Co. v. Joseph*, 656 So. 2d at 1003. In the event damages are recovered from a third person in a suit filed by either the employee or the employer, the damages shall be apportioned so that the employer's claim for workers' compensation actually paid shall take precedence over that of the injured employee; but if the damages are more than sufficient lo reimburse the employer, the excess shall be assessed in favor of the employee. La. R.S. 23:1 103(A)(1); *Burns v. Apache Corp.*, 37,396 (La. App. 2d Cir. 8/20/03), 853 So. 2d 708. When this excess is paid to the employee, the employer is entitled to a credit of such an amount against workers' compensation benefits it will become obligated to pay in the future. La. E.S. 23:1103(A)(1); *Burns v. Apache Corp, supra.* In addition, the employer is entitled to suspend weekly indemnity and medical benefits until such time as the credit is exhausted. *Landry v. Martin Mills, Inc.*, 737 So. 2d at 60. In essence, La. R.S. 23:1103(A)(1) precludes double recovery by the injured employee. *See Labruzzo v. Employers Ins. of Wausau*, 521 So. 2d 515, 522 (La. App. 4th Cir. 1988), *writ denied*, 523 So. 2d 1342 (La. 1988).

Although the trial court was correct in upholding the U.S. Fire's policy's exclusion against reimbursement by the workers' compensation carrier, we hold that the trial court incorrectly denied the workers' compensation carrier future credit for payments made by the UM carrier. Accordingly, we reverse the trial court's denial of Great American's request for a future credit for whatever damages may be paid by the UM carrier, and remand this matter to the trial court for a determination of the amount of the credit Great American is to receive minus any fees under *Moody v. Arabie, supra*

CONCLUSION

Finding that the trial court erred as a matter of law in granting a JNOV, we reverse the JNOV and render judgment having found Allsion Belle Wyble ninety (90%) at fault for causing the accident at issue and James Tolbird ten (10%) at fault for the causing the accident at issue.

IT IS **THEREFORE** ORDERED, ADJUDGED AND DECREED that there be judgment in favor of James and Lisa Tolbird, and against the defendants, Allison Belle Wyble, Trinity Universal Insurance, and U.S Fire Insurance in the following manner:

General Damages	$ 0
Allison Tolbird-loss of consortium	$ 5,000.00
Future medical expenses	$ 10,000.00
Future lost wages	$ 5,000.00
Past medical expenses	$ 59,098.59
Past lost wages	$ 21,477.46

for a total award of $100,576.05 subject to a 10% decrease because of the fault assigned to the plaintiff, the court awards plaintiffs a total of $90,518.45. Finally, we reverse the court's finding that the intervenor, Great American, is not

entitled to a future credit for damages payable under workers' compensation, and remand this matter to the trial court for a determination of the appropriate amount of credit minus fees under La. R.S. 23:1103.

REVERSED IN PART, AMENDED IN PART, AND REMANDED.

THE SUPREME COURT OF THE STATE OF LOUISIANA

JAMES TOLBIRD
VS. NO. 2005-C-0444
ALLISON BELLE WYBLE AND TRINITY UNIVERSAL INSURANCE COMPANY

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In re: Tolbird, James et al; Tolbird, Lis; - Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of Ouachita, 4th Judicial District Court Div. A, Nos. 01-4154; to the Court of Appeal, Second circuit, No. 38-969-CA

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April 29, 2005
Denied

JTK
PFC
CDK
BJJ
JPV
CDT
JLW

Supreme Court of Louisiana
April 29, 2005
Katherine N. Fontana
Deputy Clerk of Court
For the Court

Supreme Court, U.S.
FILED
AUG 2 6 2005
OFFICE OF THE CLERK

No. 05-145

In The Supreme Court of the United States

JAMES TOLBIRD AND LISA TOLBIRD,

Petitioners,

v.

ALLISON BELLE WYBLE, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND GREAT AMERICAN INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Louisiana, Second Circuit

BRIEF IN OPPOSITION

DAVID F. BUTTERFIELD
Counsel of Record
STEVEN E. SOILEAU
MAYER, SMITH, AND ROBERTS, L.L.P.
1550 Creswell Avenue
Shreveport, LA 71105
(318) 222-2135

Attorneys for Respondent United States Fire Insurance Company

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioners claim that the question presented for review is whether the failure or refusal of a jury to award any compensatory general damages to an injured plaintiff violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In fact there were general damages awarded to the plaintiff, and there would be no violation of the due process clause of the Fourteenth Amendment even if such damages had not been awarded.

STATEMENT UNDER RULE 29.6

Corporate Disclosure Statement

United States Fire Insurance Company is owned by Crum & Forster Holding Inc., which is owned by Crum & Forster Holdings Corp., which is owned by Fairfax Inc., which is owned by FFHL Group Ltd. (48.1%) and Fairfax S.a.r.l. (51.9%). Fairfax S.a.r.l. is owned by FFHL Group Ltd., which is owned by Fairfax Financial Holdings Limited, a publicly-traded Canadian company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT UNDER RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	3
I. THE LOUISIANA SECOND CIRCUIT COURT OF APPEAL CORRECTLY FOUND THAT THERE WAS A CLEAR ERROR OF LAW IN JUDGE DIMOS' GRANTING OF THE JNOV	3
II. THE CASES CITED BY PETITIONERS FOR THE PROPOSITION THAT LOUISIANA COURTS HAVE IMPLICITY ACKNOWLEDGED THAT AWARDS FOR PERSONAL INJURIES THAT ARE EITHER GROSSLY EXCESSIVE OR GROSSLY INADEQUATE VIOLATE THE DUE PROCESS CLAUSES OF THE LOUISIANA AND UNITED STATES CONSTITUTION, ARE ERRONEOUSLY CITED AND DO NOT STAND FOR THAT PROPOSITION	4
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES:

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996) 5

Coco v. Winston Industries, Inc., 341 So.2d 332 (La. 1976) 6

Green v. K-Mart Corporation, 874 So.2d 838 (La. 5/25/04) 7, 8

Henry v. Williams, 892 So.2d 765 (La. App. 2d Cir. 1/26/05) 6

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904 (1999) 7, 8, 9

Lilly v. Allstate Insurance Company, 570 So.2d 780 (La. App. 1st Cir. 1990) 3, 4

McDill v. Utica, 475 So.2d 1085 (La. 1985) 1

State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003) 5, 6

Tolbird v. Wyble, 38,969 (La. App. 2d Cir. 12/15/04), 892 So.2d 103 2

Tolbird v. Wyble, 2005-0444 (La. 4/29/05), 901 So.2d 1066 2

TXO Production Corporation v. Alliance Resources Corporation, 509 U.S. 443, 113 S. Ct. 1589 (1993) 5

Wainwright v. Fontenot, 774 So.2d 70 (La. 10/17/00) 8

Youn v. Maritime Overseas Corp., 623 So.2d 1257 (La. 1993) 6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION:

Fourteenth Amendment to the United States Constitution, Due Process Clause 2, 4, 5, 6

STATEMENT OF THE CASE

This matter arises from a two-car collision on May 2, 2001 in Monroe, Louisiana. The collision was between James Tolbird and Allison Wyble. Wyble clipped the rear of Tolbird's vehicle with hers on U.S. Highway 165 in Monroe, Louisiana. Following the wreck, Tolbird continued his job working as a meter reader for about 5 months before claiming disability. About the time he quit working, plaintiff Tolbird sued the adverse driver, Wyble, and her liability insurer, Trinity Universal Insurance Company. He also sued his employer's uninsured/underinsured motorist carrier, United States Fire Insurance Company.

Great American Insurance Company, Tolbird's employer's worker's compensation carrier, paid medical expenses and disability benefits and intervened in the lawsuit.

Prior to trial, Trinity Universal tendered its $50,000 policy limit plus interest. United States Fire made an unconditional tender pursuant to *McDill v. Utica*, 475 So.2d 1085 (La. 1985) of $30,000 to Tolbird. The uncontroverted evidence at trial showed this tender was for Tolbird's general damages.

The case was tried to a jury in the Fourth Judicial District Court for Ouachita Parish from July 28, 2003 to July 31, 2003. The jury rendered a verdict and found Wyble 90% at fault and Tolbird 10% at fault. The jury did not award Tolbird any general damages in addition to the $30,000 already tendered by United States Fire.

In post-verdict motions the trial judge granted Tolbird's request for a JNOV in part, increasing his general damage award to $120,000 (the judge specifically stated

this would be subject to a credit of $30,000 for the amount tendered by United States Fire).

The Court of Appeal found the trial court's granting of the JNOV was "clearly error of law". The Court of Appeal concluded there was nothing to support the trial judge's decision to overturn the jury's verdict and further specifically concluded that its review of the record led it to the conclusion that the jury's verdict on the general damage and lost consortium issues, altered by the trial judge's JNOV, *was* supported by the evidence presented *Tolbird v. Wyble*, 38,969 (La. App. 2d Cir. 12/15/04), 892 So.2d 103.

Petitioners filed an Application for Writ of Certiorari to the Louisiana Supreme Court following the Louisiana appellate court's determination that the trial court's grant of the JNOV was in error. However, the Louisiana Supreme Court declined to accept the Writ of Certiorari. *Tolbird v. Wyble*, 2005-0444 (La. 4/29/05), 901 So.2d 1066.

Petitioners have now filed the Petition for Writ of Certiorari to this Honorable Court. Petitioners contend that the alleged failure of the jury to award general or compensatory damages to Tolbird was a violation of his due process rights guaranteed under the Louisiana State Constitution and the Fourteenth Amendment to the United States Constitution. Respondents, United States Fire Insurance Company, now file this opposition.

ARGUMENT

I. THE LOUISIANA SECOND CIRCUIT COURT OF APPEAL CORRECTLY FOUND THAT THERE WAS A CLEAR ERROR OF LAW IN JUDGE DIMOS' GRANTING OF THE JNOV

Petitioners' contentions that no general damages were awarded in this case is erroneous and contrary to the entire record in this matter. A simple review of the Court of Appeal opinion makes this apparent. Petitioners are correct that the jury did not award any additional general damages in their verdict. However, petitioners conveniently ignore the tender of $30,000 made to Plaintiff prior to trial. Plaintiffs contend that there was "no rational basis" to assume the $30,000 tender of the UM carrier should be attributed to general damages. This ignores the testimony of the adjuster who made the tender. She specifically testified on this issue and said that the reason for the $30,000 payment was for James Tolbird's general damages, because the UM policy excluded amounts already paid by workers' compensation. Thus, at the time their verdict was rendered the jury was aware that general damages had already been tendered to Tolbird. The jury determined that no more general damages were required.

Petitioners, in their appeals to the higher courts in Louisiana and in their petition to this Honorable Court ignore the fact that what occurred in the case at bar is exactly the same as what occurred in *Lilly v. Allstate Insurance Company*, 570 So.2d 780 (La. App. 1st 1990). That case, like the case at bar, was one where the plaintiffs received a certain sum before trial ($20,000.00 in that case) and the jury was fully aware of it. That jury awarded zero in general damages. The trial judge entered a JNOV,

but the Court of Appeal concluded that the jury did not abuse its discretion in awarding no damages in addition to those already received. The same result occurred in the case at bar. Just like in *Lilly*, the plaintiffs' lawyer here argued that plaintiffs were entitled to more than the amount tendered and the defense lawyers argued that the plaintiffs had received "plenty". Like the *Lilly* jury, the jury in this case concluded that the amount tendered for petitioners' injuries was "plenty".

The Louisiana Second Circuit Court of Appeal correctly reinstated the jury's conclusion that $30,000 for general damages for James Tolbird was sufficient and the trial judge's increase of that item of damages in post-trial motions to $120,000 was error. (Petition, p. 17).

II. THE CASES CITED BY PETITIONERS FOR THE PROPOSITION THAT LOUISIANA COURTS HAVE IMPLICITY ACKNOWLEDGED THAT AWARDS FOR PERSONAL INJURIES THAT ARE EITHER GROSSLY EXCESSIVE OR GROSSLY INADEQUATE VIOLATE THE DUE PROCESS CLAUSES OF THE LOUISIANA AND UNITED STATES CONSTITUTION, ARE ERRONEOUSLY CITED AND DO NOT STAND FOR THAT PROPOSITION

Petitioners argue that a general damage award of -0- in a state tort law case "shocks the conscience" such that it constitutes a denial of Fourteenth Amendment due process protections to the injured party. To support their position, petitioners point to several state and federal decisions which they represent support the position that a general damage award of -0- creates an issue of federal constitutional law as

a violation of the due process clause of the Fourteenth Amendment.

The U.S. Supreme Court has on several occasions analyzed the issue of the constitutionality of unusually large punitive damage awards in tort cases. Petitioners cite three cases in particular, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996); *TXO Production Corporation v. Alliance Resources Corporation*, 509 U.S. 443, 113 S. Ct. 1589 (1993); and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003). The *BMW* and *TXO* cases, according to the petitioners, stand for the proposition that "states have considerable flexibility in determining the level of compensatory and punitive damages that may be awarded in any particular case . . . " (p. 4, petition). Notwithstanding the fact that this contention lends little or no support to the petitioners' argument, the above quoted language, which appears almost verbatim in the *BMW* opinion, has been altered to appear as it does in the petition herein. The language of the U.S. Supreme Court in *BMW* reads as follows: "In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *BMW*, 517 U.S. at 568. Note that this Honorable Court makes no reference whatsoever to general or compensatory damages, and in fact makes no such reference in any way, shape or form in the context of due process or any other constitutional issue with respect to general or compensatory damages. The same can be said for the other two opinions mentioned above. In fact, the court in *Campbell* only mentions general/compensatory damages in the course of *distinguishing* them from punitive damages,

stating "in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" *Id.*, at 416. Obviously, the Supreme Court did not intend their analysis in the above cases to serve as a basis for any discussion involving general damages.

The basic holding in the above-cited cases is that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Campbell*, 538 U.S. at 416. As such, those cases all hold that there exist constitutional limitations on any state's imposition of punitive damages under the Fourteenth Amendment. The factual dissimilarity between these cases and the instant matter is patently obvious. The instant matter does not involve a question of punitive damages, nor does it present issues of "grossly excessive or arbitrary punishments on a tortfeasor." Again, petitioners assert a violation of their Fourteenth Amendment rights as injured parties, not the tortfeasor's, and the issue is a lack of general damages, not an excessive imposition of punitive or exemplary damages.

Petitioners also assert that "Louisiana courts have implicitly acknowledged that awards for personal injuries that are either grossly excessive or grossly inadequate violate the due process clauses of the Louisiana and United States Constitutions and cannot stand" (p. 5, petition), pointing to the cases of *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1976); *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993); and *Henry v. Williams*, 892 So.2d 765, 39,318 (La. App. 2d Cir. 1/26/05).

In fact, these cases do not acknowledge this contention, implicitly or otherwise. Petitioners do not, and cannot, point to any statement in any of these opinions where the courts mention any sort of due process implications arising from general damage awards. Indeed, one would be hard pressed to point out any reference to the phrase "due process" anywhere in the opinions, or even the word "constitution". In sum, the statement made by the petitioners, excerpted above, is not supported in any manner by the above-referenced cases nor elsewhere in the Louisiana jurisprudence.

Finally, petitioners assert that the Louisiana Supreme Ccurt's holding in *Green v. K-Mart Corporation*, 874 So.2d 838, 03-2495 (La. 5/25/04), read in conjunction with the U.S. Supreme Court decision in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904 (1999), provides a basis for the statement that "[p]ersons injured in Louisiana through the wrongful conduct of another have a constitutionally protected interest to be fairly and adequately compensated through compensatory . . . damages . . . " (p. 5, petition). Once more, this position finds no support in the cases cited by the petitioners or anywhere else in the Louisiana or Supreme Court Jurisprudence. The court in *Green* held simply that it was an abuse of discretion for the lower court to award special damages for medical expenses, but to allow an award of -0- for general damages, where it is clear that the plaintiff suffered injury and resultant pain and suffering. Petitioners characterize the court's holding as a charge to Louisiana's juries that "where the trier of fact determines that the plaintiff has suffered injuries causally related to the accident and received medical treatment for those injuries, then it is *mandatory* to award general or compensatory

damages for those injuries" (p. 5, petition). Petitioners then use an out-of-context quote from the *Thompson* case supposedly to substantiate a "constitutionally protected result to general damages" as an argument, stating that "[t]he use of 'explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a [constitutionally protected] interest'" (p. 5, petition, quoting *Thompson*, 490 U.S. at 463).

Petitioners' assertions that the *Green* and *Thompson* decisions rendered by the Louisiana and U.S. Supreme Courts impose a mandatory award of general damages when special damages are awarded is erroneous. First, nowhere in the *Green* opinion does the court say anything remotely close to the statement petitioners ascribe to the decision, i.e. that it is mandatory for courts to award general damages where medical damages are awarded and the plaintiff has in fact been injured. The court simply states, relying on their holding in the previous case of *Wainwright v. Fontenot*, 774 So.2d 70, 2000-0492 (La. 10/17/00), that "When, as here, the jury has awarded special damages but has declined to award general damages, the reviewing court must determine whether the jury's finding 'is so inconsistent as to constitute an abuse of discretion.'" *Green*, quoting *Wainwright*, 874 So.2d at 844.

In the case at bar, the Louisiana Second Circuit Court of Appeal determined that the jury award was not an abuse of discretion, and the Louisiana Supreme Court declined petitioners' writ of certiorari. Thus, the reviewing courts have determined exactly what was required in *Green*. Moreover, the *Thompson* case, involving constitutionally protected *liberty* interests of prisoners, does not announce a general principal of law regarding constitutionally protected

interests, as the petitioners would have this Honorable Court believe. The *Thompson* case is limited in application to protected liberty interests in the prison context, and is completely irrelevant to the instant matter.

CONCLUSION

The ruling of the Louisiana Second Circuit Court of Appeals, determining that the trial judge's grant of JNOV in this matter was an error of law, is correct and should be upheld. The jury was fully aware of the prior tender of $30,000 to Tolbird and incorporated that knowledge into their verdict. Petitioners have failed to show that the jury abused its discretion. Furthermore, petitioners have cited jurisprudence that does not in fact support the contentions that petitioners are alleging, in an effort to create a non-existent federal right, to raise a non-existent federal question. Petitioners attempt to create a due process violation by piecing together portions of opinions that stand for other propositions because there is no case law supporting their claims. The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID F. BUTTERFIELD
Counsel of Record
STEVEN E. SOILEAU
MAYER, SMITH, AND ROBERTS, L.L.P.
1550 Creswell Avenue
Shreveport, LA 71105
(318) 222-2135

Attorneys for Respondent,
United States Fire
Insurance Company